ORAL ARGUMENT SCHEDULED FOR NOVEMBER 14, 2018

CASE NOS. 18-1037, 18-1043

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner

OFFICE OF PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
Intervenor

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S FINAL REPLY BRIEF

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GLOSSARY

APA: Administrative Procedure Act

CX: Company (PIAA) Exhibit in RD hearing

GCX: General Counsel Exhibit in support of summary judgment

JA: Joint Deferred Appendix

DDE: Regional Director's Decision and Direction of Election

JX: Joint Exhibit in RD hearing

NLRA: National Labor Relations Act

NLRB or Board: National Labor Relations Board

NLRB Dec. on Review: NLRB Decision affirming the RD after review, 365 NLRB No. 107 (July 11, 2017)

NLRB SJD: NLRB Decision on summary judgment, 366 NLRB No. 10 (Jan. 26, 2018)

OPEIU or Union: Intervenor Office and Professional Employees International Union

PIAA: Pennsylvania Interscholastic Athletic Association, Inc.

PX: Petitioner (Union) Exhibit in RD hearing

RD: Regional Director

Tr: Transcript of RD hearing

I. SUMMARY OF ARGUMENT

Contrary to the opposing briefs, the Board's Order must be denied enforcement because it expressly relied on the Board's 2014 *FedEx* decision and thereby failed to adhere to this Court's holdings in *FedEx I and II.*[1] PIAA properly objected to the Board's application of its *FedEx* standard in this case under Section 10(e) of the Act.

Under the common law of agency standard required by the Supreme Court, the opposing briefs fail to justify the Board's finding that PIAA-registered lacrosse officials were employees, not independent contractors. The briefs particularly fail to overcome the complete absence of PIAA supervision over officials' exercise of independent judgment over the games, the skills required, the officials' supply of their own tools, the extremely short duration of their performance of work, their methods of payment, the parties' mutual understanding of independent status, and the officials' entrepreneurial opportunities within and outside PIAA.

Finally, the opposing briefs fail to support the Board's erroneous finding that PIAA is not a political subdivision within the meaning of Section 2(2) of the NLRA. In particular, the opposing briefs mischaracterize the provisions of Act 91, 24 P.S. 16-1601, *et seq.*, which for the first time made PIAA and administrative arm of the Commonwealth. Also contrary to the oppositions, the PIAA Board

[1] *FedEx Home Delivery v. NLRB (FedEx I),* 563 F.3d 492 (D.C. Cir. 2009); *FedEx Home Delivery v. NLRB (FedEx II)*, 849 F.3d 1123 (D.C. Cir. 2017).

overwhelmingly consists of representatives appointed by public officials and/or who are public officials themselves, and are otherwise responsible to the public.

For all of these reasons, as further explained below, the Board's decision must be denied enforcement.

II. ARGUMENT

A. Contrary to the Opposing Briefs, the Board's Analysis of the Independent Contractor Issue Cannot Be Enforced Due to the Board's Refusal to Adhere to This Court's Holdings in *FedEx I* and *II*

PIAA's opening brief argued first that the Board's decision cannot be enforced because the Board refused to acquiesce to this Court's holdings in *FedEx I* and *II*. (PIAA Br. 22-25). *See Heartland Plymouth Court MI, LLC v. NLRB*, 650 Fed. Appx. 11 (D.C. Cir. 2016) ("The Board's refusal to adhere to our precedent dooms its decision before this court.").

In response, the Board's brief argues that PIAA somehow waived its argument that the Board applied an erroneous legal standard here. (NLRB Br. 45-48). To the contrary, PIAA properly objected to the Board's reliance on *FedEx* to find the officials to be employees, not independent contractors, throughout the proceedings below. *See* JA717, 724, 728, 729, 734, 735; JA750, 773-74, 778; *see also* JA820 (objecting to the Board's finding of employee status in the unfair labor practice proceeding).

The cases relied on in the Board's brief applying Section 10(e) of the Act all dealt with situations where the waiving party failed to object to a particular Board finding *at all*. None of the cases found a waiver under Section 10(e) due to the party's mere failure to cite some aspect of precedent underlying the substantive objection, as the Board's brief is arguing here. Thus, in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (NLRB Br. 46, n.7), the employer failed to object at all to the NLRB's finding that union picketing did not violate Section 8(b)(4)(A). Similarly, in *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550-551 (D.C. Cir. 2016) (NLRB Br. 25, 38, 45), the employer failed to object at all to the Board's choice of remedy for violations of the Act. To the same effect are *Alois Box co. v. NLRB*, 216 F.3d 69, 76-78 (D.C. Cir. 2000), and *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (NLRB Br. 46, n.7-8).

In the present case, as previously noted, PIAA repeatedly objected to the Board's finding PIAA's officials to be employees, and PIAA objected specifically to the Board's reliance on *FedEx* in making its determinations of employee vs. independent contractor status.[2] Yet the Board's brief persists in seeking a waiver finding because PIAA somehow failed to articulate sufficiently the *reasons* why *FedEx* was the wrong standard for the Board to apply. This granular application of

[2] *See, e.g.,* JA735 at n.13: "The Regional Director's almost total reliance for her conclusion on *Fed Ex Home Delivery*, 361 NLRB No. 55 (2014) is misplaced."

Section 10(e) is nowhere found in the statute, nor has any case cited by the parties so held. To the contrary, this Court cautioned against such "hyper-refinement" of the Section 10(e) objection requirement in *HTH Corp. v. NLRB*, 823 F.3d 668, 673-74 (D.C. Cir. 2016). *See also Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981) ("[W]hen the issues implicated by an imprecisely drafted objection are made evident by the context in which it is raised, Section 10(e) is not a bar.").

The Board's brief fares no better in addressing the merits of PIAA's argument that the Board's reliance on *FedEx* violated this Court's holdings in *FedEx I* and *FedEx II*. The brief asserts the *FedEx II* opinion was somehow limited to the employees of FedEx alone, and that the Court in *FedEx II* "had no occasion to review the Board's discussion of the common law test . . . ." (NLRB Br. 47). As shown in PIAA's opening brief (at 22-23), however, the *FedEx II* Court expressly considered and rejected the Board's "new formulation of the legal test to be applied" for independent contractor status after first reaffirming the controlling standard set forth in the Supreme Court's holding in *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968). *FedEx II*, 849 F.3d at 1127.

Finally, the Board's brief claims, without citation to any authority, that this Court's order *vacating* the Board's ruling in *FedEx II* was limited to setting aside the Board's remedial order, thereby somehow leaving the rest of the Board's

opinion intact. (NLRB Br. 47-48). No case has previously separated Board opinions and orders in this manner, and for good reason. Contrary to the Board's brief, the "decision and order" vacated by this Court in *FedEx II* constituted an integrated whole, and the entire Board ruling was necessarily vacated by the Court's decision. The Board was not free to simply ignore this Court's *vacatur* and such a decision should not be enforced. *See NLRB v. Goodless Bros. Elec. Co., Inc.*, 285 F.3d 102, 110 (1st Cir. 2002).

B. The Opposing Briefs Do Not Justify the Board's Failure to Properly Apply the Common Law Agency Criteria to PIAA's Officials

Regardless of the applicable legal standard, PIAA's opening brief pointed out numerous errors in the Board's analysis of the common law independent contractor factors. (PIAA Br. 26-46). In response, the opposition briefs attempt to justify the Board's errors, but their arguments should be rejected, as follows:

1. Contrary to the Opposing Briefs, PIAA Does Not Exercise Employment-Level Control Over the Means and Manner of the Officials' On-Field Performance

The Board's brief repeats the Board's erroneous findings of "control," relying on PIAA's standard-setting functions as evidence of "employment" control, notwithstanding the virtually identical control exercised by PIAA over school principals, athletic directors, coaches, and student athletes, none of whom are claimed to be employees of PIAA. For its part, the OPEIU brief advocates an

almost exclusive focus on entrepreneurial opportunities to the virtual exclusion of all the other factors, a position not adopted by the Board because it would certainly violate this Court's holdings in *FedEx II* and *Lancaster Symphony*. (OPEIU Br. 18-20).

Contrary to the opposing briefs, the absence of day-to-day control over the performance of officials is and always has been a significant factor under the common law of agency and is undisputed in the record of this case. PIAA exercises virtually *no* day-to-day control over the work performed by registered officials, who call each game with no supervisor present, exercising completely independent judgment and discretion while officiating. The opposition briefs fail to address or distinguish the Board's own precedent cited by PIAA, which found similar independence to strongly support independent contractor status. *See Porter Drywall, Inc*., 362 NLRB No. 6, slip op. at 3 (2015), and *Pennsylvania Academy of Fine Arts*, 343 NLRB 846, 847 (2004).[3]

Both opposing briefs rely heavily on this Court's decision in *Lancaster Symphony Orchestra v. NLRB,* 822 F.3d 563 (D.C. Cir. 2016), without acknowledging or addressing the extraordinary difference in the degree of control

[3] The Board's brief misapprehends PIAA's arguments in claiming that PIAA's brief "waived" the right of reply by supposedly not addressing every single aspect of control identified in the Board's opinion. (NLRB Br. 23-24). Where not specifically alluded to, the control considerations relied on by the Board should be ignored because they are not relevant indicators of "employment" control, as opposed to standard setting.

exercised by the Symphony over the musicians. They were led at each performance and rehearsal by an omnipresent conductor who dictated every aspect of the musicians' day-to-day performance of their work. *Id*. at 566.[4] There is of course no "conductor" on the lacrosse field and indeed no day-to-day supervisory control over any officials' individual on-field performance, facts which are fatal to the Board's finding of employee status here.

Equally distinguishable is *City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980) (NLRB Br. 22), in which the Court found employment- level control because the cab company required drivers to chronicle their movements and fares, the company closely regulated the hours of work, and the company-controlled drivers' selection of passengers. None of these indicia of control is present here.

The Board's brief repeats the Board's erroneous claim that "PIAA mandates unconditional acceptance of the dictated game schedules," and thereby "controls when, where, and for how long the officials work." (NLRB Br. 22). This assertion ignores the undisputed fact that officials are completely free to pick and choose the games they work, to reject assignments at will, and to work outside PIAA's jurisdiction. The case of *Slay Transp. Co*., 331 NLRB 1292, 1293-94 (2000), cited in the Board's brief (at 22), is distinguishable for the same reason.

[4] To the same effect is *Seattle Opera v. NLRB*, 292 F.3d 757, 760 (D.C. Cir. 2002), also cited in the Board's brief.

The opposition briefs, like the Board's decision, also deliberately ignore PIAA's primary purpose of creating a registry of certified officials who will exercise their independent judgement to promote fair athletic competitions of independent actors, *i.e.*, schools and student athletes. The cases cited in the opposing briefs dealt with employers who controlled the daily functions of workers for the proprietary purpose of serving the employers' own business enterprises, under completely different circumstances from the present case. *See Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) (drivers prohibited from deviating from the order of stops and required to carry pagers so as to be on call for delivery service employer); *Film & Dubbing Prods., Inc*., 181 NLRB 583, 583-84 (1970) (film production company trained, tested and directed film translators to fulfill its customers' film production needs).

As further noted in PIAA's opening brief (at 30), this Court has reaffirmed that indicia of control deriving from customer demands and government regulations "do not determine the employment relationship." *FedEx I*, 563 F.3d at 501; *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995); *North Am. Van Lines v. NLRB* ("NAVL"), 869 F.2d 596, 599 (D.C. Cir. 1989). Ignoring these holdings, the Board's brief, like the decision itself, repeatedly relies on customer-driven and government-driven demands for standardization and fairness, as the

primary basis for finding PIAA's officials to be employees.[5] *See also Collegiate Basketball Officials Assn., Inc. v. NLRB*, 836 F.2d at 147.[6]

2. The Opposing Briefs Fail to Support the Board's Finding That Officials Are Not Engaged In a Distinct Occupation or Business

PIAA's opening brief (at 31-33) explained why, contrary to the Board's opinion, PIAA-registered officials are engaged in a distinct occupation from PIAA itself. In response, the Board's brief repeats the agency's assertion that PIAA's officials perform "essential functions," which is irrelevant to the proper inquiry. (NLRB Br. t 27). *See Crew One Productions, Inc.* v. NLRB, 812 F.3d 945, 953-54 (11th Cir. 2016) ("That the [disputed individuals] perform essential work proves nothing in regard to the inquiry before us . . . ."); *see also Local 777, Seafarers Int'l Union v. NLRB,* 603 F.2d 862, 898-99 (D.C. Cir. 1978) (opinion denying rehearing) (declaring that the "essential" nature of work "has no relevance" to the issue of independent contractor status).

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[5] The Board's brief criticizes PIAA's alleged failure to identify a state law provision requiring the Association to adopt "particular standardized lacrosse officiating rules." (NLRB Br. 24, n.2). The Board ignores the Pennsylvania Code provisions cited throughout PIAA's brief, which plainly established the requirement of standardized rules. *See* 24 P.S. 16-1604-A.

[6] The Board's brief wrongly accuses PIAA of waiving its claim that the Board erred in considering potential authority instead of the lack of actual discipline. (NLRB Br. 25, n.3). Contrary to the Board, PIAA raised this argument to the Board by citing to the *Big East* case, 282 NLRB at 347, where the Board found insufficient control due to the absence of "mid-season or on the spot discipline."

The Board's brief disingenuously refers to the courts' holdings above as "suggestions" that somehow "merely reaffirm[] the principle that no individual common-law factor is dispositive." (*Id.*). To the contrary, the decision of this Court in *Seafarers* and the Eleventh Circuit's holding in *Crew One* flatly contradict the Board's analysis of an important common law factor. *Seafarers*, 603 F.2d at 898-99; *Crew One*, 812 F.3d at 953-54 ("Crew One is in the business of referring stage hands to event producers, but Crew One does not perform stagehand work itself. Only the stage hands do.").

3. Contrary to the Opposing Briefs, the Absence of PIAA Supervision Over the Officials Strongly Supports Their Independent Contractor Status

The Board's brief struggles to justify the Board's finding of sufficient supervision to support employee status, because the record is clear PIAA does not supervise the officiating of games *at all*. (NLRB Br. 28-29). The Board's brief persists in relying on post-match evaluations of officials as a substitute for direct supervision (NLRB Br. 29-30), but the brief ignores this Court's holding in *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995), quoted in full in PIAA's opening brief but worth reiteration: "[S]teps taken to 'monitor, evaluate, and improve the results' of his work, without supervision over the means by and manner in which he does his work, indicates that the worker is an independent contractor." *Id*. at 858. *See also Big East*, 282 NLRB at 347 (finding insufficient

supervision to justify employee status "in the absence of any evidence of mid-season or on-the-spot discipline, ..."); *accord*, *Yonan v. United States Soccer Fed'n, Inc.*, 833 F. Supp. 2d 882, 889 (N.D. Ill. 2011); and *Meyer v. U.S. Tennis Assn.*, 2014 U.S. Dist. LEXIS 128209 (S.D. N.Y. 2014).[7]

In response to PIAA's further contention that even its limited evaluation of officials is mandated by state government regulation (PIAA Br. 35, citing 24 P.S. § 16-1604-A), the Board's brief quibbles that Act 91 only required PIAA to adopt "some form of an evaluation system." (NLRB Br. 30). Neither the Board's opinion nor its brief gives any explanation, however, why the specificity of the statute should make any difference; all that should matter is that the directive to evaluate officials came from the government. *FedEx I*, 563 F.3d at 501.

4. The Opposing Briefs Fail to Support the Board's Finding That the Skills Factor "Slightly" Favors Employee Status

The opposing briefs, like the Board, rely on the officials' skills being "integral to the principal's business" which is a separate issue from the question of the skills themselves. (NLRB Br. 31). In this regard, the Board's brief also relies incorrectly on *Lancaster Symphony Orchestra*, 822 F.23d at 566-70, as to the skills

[7] The Board's brief does not address or attempt to distinguish any of the above cases, and must therefore be deemed to have conceded their holdings on this issue. Meanwhile, the cases relied on by the Board's brief (NLRB Br. 28), are themselves readily distinguishable. *See City Cab*, 628 F.2d at 264 (employer required drivers to chronicle their fares and movements throughout the day); *Sisters' Camelot*, 373 NLRB No. 13 (2015) (employer oversaw canvassers' work by reviewing immediate post-work reports).

issue. In that case, this Court found that the orchestra musicians' high skill level weighed in favor of independent contractor status. The Court's ultimate finding of employee status in *Lancaster* did not derive from the skills factor but was the result of additional facts not present here, in particular the dictatorial control exercised by the orchestra conductor.[8]

Another case relied on by the Board's brief, *Am. League of Prof'l Baseball Clubs*, 180 NLRB 190 (1969), did not even address the issue of independent contractor status, let own the question of the umpires' skill levels. The sole voter eligibility question at issue there was whether the umpires were supervisors. *Id*. at 192-93.

The Board's brief fails to distinguish the cases cited by PIAA, in which similarly skilled workers were found to be independent contractors. *See Porter Drywall*, 362 NLRB No. 6, slip op., p.4 (2015) (skilled drywall crew leaders found to be independent contractors); *Pennsylvania Academy of Fine Arts*, 343 NLRB 846, 847 (models demonstrating "high level of skill" found to be independent contractors). It is also noteworthy that the Board's brief does not even attempt to

[8] The *Lancaster* case also undercuts the Board's argument, repeated in the Board's brief, that the strength of the skills factor is mitigated by "in-house training" provided by PIAA to the officials so that they maintain their understanding of the rules. (NLRB Br. 32). The Lancaster Symphony required its already-skilled musicians to undergo regular Symphony rehearsals in order to hone their skills. 822 F.3d at 564. Nevertheless, this Court accepted the skills factor as unequivocally supporting independent contractor status. *Id*. at 568.

support the Board opinion's reliance on *CNN America*, 361 NLRB No. 47 (2014), which PIAA's brief showed contained no discussion of skills on the independent contractor issue. (PIAA Br. 37).

5. The Opposing Briefs Fail to Justify the Board's Error in Discounting the Weight to Be Given the Officials' Supplying Their Own Instrumentalities of Work

As conceded in the Board's brief, the Board acknowledged that the officials in this case provide their own equipment, including whistles, pencils, uniforms, hats, penalty markers, timing devices, and scorecards. (NLRB Br. 39). But the Board's brief does not support the Board's error in claiming PIAA "provides the place and time of work," by designating the sites and times of the games. (*Id*., see PIAA Br. 38).

As the record makes clear, PIAA plays *no* role in designating game sites or times during the regular season, which constitutes more than 70% of the officials' work availabilities. All such designations are handled by the competing schools. (JA26). In addition, contrary to the Board's finding, the officials are under no obligation to appear at such designated sites or times because they have complete discretion whether to accept any assignment from the schools. (*Id*.).

Even during the brief playoff period consisting of relatively few games assigned to relatively few officials, the officials are under no obligation to accept playoff assignments or to officiate any particular game at any particular time or

place. Also, even during the playoffs the designated fields do not belong to, and are not "supplied" by, PIAA. The fields are typically public venues belonging to and supplied by the schools. (JA199-202).

Thus, what the Board described as "conflicting evidence" in its opinion was actually not in conflict at all. It remains undisputed that the officials supply their own instrumentalities, that PIAA does not supply any instrumentalities, and that game venues are public facilities supplied by third parties. The Board clearly erred in its analysis of this factor. *See, e.g., FedEx Home Delivery v. NLRB (FedEx I)*, 563 F.3d at 503.

6. Contrary to the Opposing Briefs, the Short Length of the Lacrosse Season Strongly Supports Independent Contractor Status

The Board's brief devotes only one paragraph to its defense of the Board's finding "inconclusive" the extremely short duration of the lacrosse season. (Board Br. 40). The brief restates the Board's contention that some officials renew their memberships in PIAA annually and officiate games in subsequent years, and the brief offers only two "Cf." citations of inapposite cases in support of the Board's theory that such renewals make any difference as a matter of law.

In truth, both of the cases cited by the Board, *Big East*, 282 NLRB at 343, and *Lancaster Symphony*, 822 F.3d at 568, found that the short duration of the seasons at issue there was a factor *supporting* independent contractor status,

notwithstanding annual agreements signed by the officials and musicians in those cases. It is also noteworthy that PIAA's lacrosse season is significantly shorter than the seasons described in either *Big East* or *Lancaster Symphony*.[9] Meanwhile, the Board's brief makes no effort to distinguish the case cited by PIAA, *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847, which found models' short "seasons" supported an independent contractor finding, notwithstanding that the models signed semester-long contracts that could be renewed at their discretion.

7. The Opposing Briefs Do Not Justify the Board's Erroneous Finding That the Method of Paying the Officials Supports Employee Status

Notwithstanding the arguments in the Board's brief (NLRB Br. 33), it remains undisputed in the record that the officials are paid on a per-game basis, regardless of how long each game lasts, that PIAA does not withhold deductions from officials' pay, and that for most of the (extremely brief) season PIAA is not responsible for paying the officials at all. (PIAA Br. 40-41). The opposing briefs ignore the numerous holdings citing such payment methods as strong indicators of independent contractor status. *Big East Conference*, 282 NLRB at 335;

[9] The brevity of the high school lacrosse season, along with many other factors, also distinguishes the officials here from the professional league umpires and referees to whom the *Amicus* Association of Minor League Umpires seeks to compare them. (*Amicus* Br. 6). No doubt for this reason, the Board's opinion did not seek to equate interscholastic athletics and professional sports leagues.

Pennsylvania Academy of the Fine Arts, 343 NLRB at 847; *Crew One productions, Inc*., 811 F.3d at 1312; *Argix Direct, Inc*., 343 NLRB at 1021.

The Board's brief incorrectly claims that PIAA "directly controls the process" by which schools pay officials are paid and that PIAA dictates the fees paid by the schools. (NLRB Br. 34). The record shows the fees are negotiated by officials with the different schools, while PIAA plays only a minor role. (JA431).

8. Contrary to the Opposing Briefs, PIAA Is Not In the Business of Officiating, But Is Only In the Business of Registering and Certifying Officials to Maintain Uniform Athletic Standards

As previously discussed, the Board's opinion improperly conflated the roles of PIAA and the officials in order to find that the work of the officials is "integral" to the "business" of PIAA. (NLRB Br. 25-27). Contrary to the Board's brief, this factor should have been deemed to be inconclusive at best and certainly should not have been found to "strongly support" a finding of employee status. It is simply not true that PIAA "could not perform its business operations without the work of its officials." (*Id*.).

It must also be recalled that PIAA has treated the officials as independent contractors for many decades, and has been repeatedly found by other government agencies and courts in Pennsylvania to be justified in operating in such fashion. Absent reversal, the Board's order will be deeply destabilizing to interscholastic

athletics in Pennsylvania and elsewhere, as explained more fully in the *Amicus* Brief of the National Federation of State High School Associations (NFHS), and for this reason as well should be denied enforcement.

9. The Opposing Briefs Fail to Justify the Board's Finding "Inconclusive" the Clear Belief of the Parties That They Created an Independent Contracting Relationship

The Board's brief fails to address or distinguish this Court's holding that independent contractor agreements entered into by the parties are "indicative" of independent contractor status. *FedEx I*, 563 F.3d at 497-98, 502, n.8 (referring to the FedEx agreement as "take-it-or-leave-it" and stating "we will draw no inference of employment status" from that fact); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858-59 (D.C. Cir. 1995) (holding the same way without regard to who drafted the agreements); *NAVL*, 869 F.2d at 599. *See also Crew One*, 812 F.3d at 952-53 ("[The Board gave the agreements less weight only because Crew One insisted that all of the stagehands sign one. This theory is not a valid defense to the formation of the agreements.").

The record is undisputed here that the officials fully understood what they signed. (PIAA Br. 42-44). The drafting of the documents is thus irrelevant to consideration of this factor under the common law test. The Board was required to find that the parties intended to enter into an independent contract relationship, and

that this factor of common law agency strongly supported an independent contractor finding.

10. Contrary to the Opposing Briefs, the Officials Exercise Entrepreneurial Authority, and There Is No Common Law Requirement That Independent Contractors Operate an Independent Business Enterprise

The opposing briefs assert the Board was correct to discount evidence of the officials' independent entrepreneurial status in the absence of proof that they operate "independent businesses." (NLRB Br. 34-35; OPEU Br. 8-16). This supposed factor does not appear in the Restatement or in the decisions of this Court. Therefore, PIAA should not be obligated to meet such a test.

Contrary to the opposing briefs, entrepreneurial activity is strongly in evidence here, because the officials maintain other full-time careers, are free to officiate at non-PIAA games and do in fact officiate other games anywhere and anytime they want. The officials have total freedom to make the entrepreneurial decision to increase or decrease their earnings by simply accepting more or fewer assignments at their discretion or by devoting more or less time to their independent careers. Identical facts in the *Big East* case led the Board to find that the officials there "seem to operate their own independent businesses." 282 NLRB at 343. *See also College Basketball Officials Assn., Inc. v. NLRB*, 836 F.2d at 147 (rejecting any requirement of proof of an independent business).

The opposing briefs also err in claiming PIAA presented "insufficient" evidence at the hearing of "real opportunities" for officials to officiate non-PIAA athletic events. To the contrary, witness Patrick Gebhart testified specifically and without contradiction in the record that officials "absolutely" officiate non-PIAA events. (JA30-31). Gebhart testified to specific examples including "rec contests," "AAU," and collegiate events, as well as non-PIAA member schools, out-of-state schools in "multiple states," and non-athletic careers. (*Id*. at JA31).

Relying on *dicta* in *Lancaster Symphony*, the opposing briefs wrongly express concern that giving weight to the officials' freedom to work elsewhere and at times of their own choosing would lead to "almost automatic classification of many part-time workers as contractors." (NLRB Br. 37; OPEIU Br. 12, quoting *Lancaster Symphony*, 822 F.3d at 570). But the officials here are not regular part-time workers as that term is normally understood.[10] They instead perform their work on a "free lance," project-by-project basis, with numerous independent attributes described elsewhere in this brief that are not commonly shared by regular part-time employees. In any event, the ability of skilled contractors to earn income by offering their services to other principals has long

[10] For one thing, the lacrosse officials do not work enough hours to qualify as regular part-time employees under the Board's longstanding test set forth in *Davison-Paxon*, 185 NLRB 21, 24 (1970) (requiring a quarterly minimum of 52 hours worked).

been recognized as a significant entrepreneurial indicator of independent contractor status, and the Board was wrong to give so little credit to that factor here.

11. Contrary to the Opposing Briefs, *Big East's* Finding of Independent Contractor Status Strongly Supports the Same Finding In the Present Case

As PIAA demonstrated in its opening brief (44-45), the material facts of the *Big East Conference* case were similar to the present case, though the present facts actually favor independent contractor status even more strongly due to the shorter season and greater independence of the virtually unsupervised officials here. The opposing briefs attempt to bolster the Board's efforts to distinguish *Big East*, but their efforts must be found wanting. (NLRB Br. 41-45; OPEIU Br. 16-17).

As noted in PIAA's opening brief, in *Big East* the Board relied on its findings that the officials there were highly skilled, had the ability to accept or refuse assignments, had never been terminated or disciplined for in-season performance, paid dues to the association, were paid on a fixed fee basis, had other full-time employment, and could increase their earnings by officiating for other entities. 282 NLRB at 335. All of the above stated material facts are present with regard to PIAA-registered officials, only more so.

Like the Board's opinion, the opposing parties rely primarily on the Board's claim that the role played by the officials' CBOA association in *Big East* somehow requires a different result here. Yet the *Big East* Board at the time gave little or no

weight to the official association's screening function, negotiation of a fee schedule, or evaluation of officials' performance. Indeed, the Board specifically stated that it was "unnecessary to rely on the judge's finding that the officials' capacity to affect their working conditions by negotiating through an agent, the CBOA, supports the inference that they are independent contractors." 282 NLRB at 335, n.1.

The additional notion that *Big East* was itself somehow inconsistent with the common law of agency, raised in the Board's brief (44-45), is belied by the fact that the decision has never before been questioned by the Board or any court. *See also Porter Drywall, Inc*., 362 NLRB No. 6, in which the Board relied on *Big East* to support a finding of independent contractor status as recently as 2015.

12. Summarizing Again the Tally of Independent Contractor Factors, In Light of All the Briefs

Notwithstanding the opposing briefs, the totality of all the common law factors remains overwhelmingly in favor of independent contractor status. This is particularly clear when the "pro-independence" factors the Board failed to credit are properly taken into account. Thus, the minimal PIAA control over the officials' day-to-day management of games, the complete absence of PIAA supervision at the games, the high level of skills required of the officials, the officials' supply of their own work tools, the extremely brief length of the season, the entrepreneurial opportunities to pursue other careers outside (or within) PIAA,

the method of payment, and the parties' mutual understandings, all should have been counted strongly in favor independent contractor status. The few remaining less conclusive factors should have been deemed insufficient to find employee status. The destabilizing effect of the Board's decision on interscholastic athletics, as explained in the NFHS *amicus* brief, should also be taken into account.

As was true in *FedEx I*, 563 F.3d at 504, the Board's holding is not one of "two fairly conflicting views." Instead, the Board unfairly minimized strong evidence of independence and unfairly exaggerated weak evidence of control, thereby reaching a pre-ordained result. Because the Board improperly analyzed a majority of the common law factors, the decision should be denied enforcement.

C. Contrary to the Board's Brief, the Board's Order Should Also Be Denied Enforcement Because PIAA Is a Political Subdivision Within the Meaning of the Act

As explained in PIAA's opening brief, the Board erred in declining review of and thereby affirming the Regional Director's Decision and Direction of Election, which failed to find PIAA to be a political subdivision of the Commonwealth of Pennsylvania exempted from the NLRA under Section 2(2) of the Act. (PIAA Br. 47-54). *NLRB v. Nat'l Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) ("*Hawkins County*"). In response, the Board's brief repeats the errors of the Regional Director's opinion, and the Board's decision should be denied enforcement on this additional ground. (NLRB Br. 49-56.).

With regard to the first *Hawkins County* test - "creation by the state" - the Board's brief ignores the realities of Act 91, focusing instead on PIAA's previous existence and minimizing the Act's fundamental re-establishment of PIAA. (NLRB Br. 50-51). It is of course true that PIAA existed prior to 2000 and was informally fulfilling a public service pursuant to the wishes of its predominately public school members. But it is equally true that Act 91 for the first time arrogated to the Commonwealth full governmental control over the Association, significantly altering its board membership, creating new statutory goals, and establishing unprecedented government oversight over PIAA operations. With the passage of Act 91, the General Assembly became responsible for overseeing PIAA, creating first the Oversight Council and then the Oversight Committee for the express purpose of overseeing the operations of the PIAA, a governmental function which never existed before the year 2000. 24 P.S. § 16-1605(A).

The Board's brief in effect confirms that this case is one of first impression, in as much as the opposing parties cite no case decided under Section 2(2) in which a remotely similar state "takeover" of a private entity has occurred. Significantly, the Board's brief does not rely on *Chicago Mathematics & Science Academy Charter School, Inc*. (CMSA), 359 NLRB 455 (2014), the case on which the Regional Director primarily relied. The Board's brief thus concedes PIAA's showing that *CMSA* is completely inapposite. (PIAA Br. 50). The Board's brief

instead relies on *Midwest Div.-MMC*, 867 F.3d 1288, 1296-97 (D.C. Cir. 2017), but that case is not at all similar to this one either, as PIAA explained in its opening brief. (PIAA Br. 51).

The reality of this case is that Act 91 for the first time made PIAA an "administrative arm" of the Commonwealth, reinforced by state oversight and direct reports.[11] Whether that constitutes a "creation" or a "re-creation" is a technical distinction that does not bear the weight placed on it by the Board's brief.

It must also be noted that because the Board denied PIAA's request to review the Regional Director's decision on this issue, the Board itself has not squarely addressed whether the Regional Director properly interpreted the Act. Contrary to the Board's brief, therefore, the Board is not entitled to the Court's deference in this case of first impression when the agency has "fail[ed] to wrestle with the relevant statutory provisions . . . ." *Hosp. of Barstow, Inc. v NLRB*, 820 F.3d 440 (D.C. Cir. 2016) (remanding to the Board to enable the agency to interpret the statute in the first instance).

Even if the Board's application of the first criterion of *Hawkins County* could be allowed to stand, however, the Board's brief fails to support the Regional Director's misapplication of the second criterion dealing with whether PIAA is

[11] The Board's brief (at 51, n.10) questions whether Act 91's requirement that PIAA comply with the Pennsylvania Sunshine Act is proof of PIAA's "public agency" status; but since the Sunshine Act by its terms only applies to public agencies, this conclusion is unavoidable. 65 P.S. § 701. *See also* 65 P.S. § 67.102.

administered by individuals who are "responsible to public officials or to the general electorate." 402 U.S. at 605. As to this second criterion, the Board's brief misstates the record in arguing that the PIAA board members, who overwhelmingly consist of public school employees, are not appointed by or responsible to the public officials who they represent on the PIAA board. (NLRB Br. 55).

To the contrary, as shown in PIAA's opening brief, Executive Director Lombardi testified without contradiction that "almost all" of the PIAA Board members were representatives of public schools, and were selected by the schools through their various PIAA districts or school associations. (JA 8, 26-27; *see also* JA 415, List of the Members of the PIAA Board and their affiliations). In addition, the entire PIAA Board is directly responsible to the legislature through the Oversight Committee established by Act 91. For both reasons, PIAA must be found to satisfy the second criterion of *Hawkins County*. *See NLRB v. Princeton Mem. Hosp.*, 939 F.2d 174, 179 (4th Cir. 1991); *Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266 (6th Cir. 1990); *N. Community Mental Health Center, Inc.*, 241 NLRB 323 (1979).

In response, the Board's brief argues that *Princeton Memorial Hospital* is somehow in conflict with this Court's decision in *Midwest Div. – MMC, LLC*, but that is not so because *Midwest Div. – MMC, LLC* is again distinguishable. This

Court concluded in the latter case that certain hospital administrators were not appointed by public officials. *Id*. at 1297. Unlike the hospital in *Midwest Div.-MMC, LLC*, however, the majority of PIAA's Board are elected or appointed by and subject to removal by public officials, *i.e*., the public schools who make up 85% of PIAA's 1400 member schools, and the school boards who make their selections through the public school board association. Under such circumstances, PIAA must be found to be a political subdivision under *Hawkins County*.[12]

III. CONCLUSION

For the reasons set forth above and in PIAA's opening brief, PIAA asks that its petition for review be granted and that the Board's cross-petition for enforcement be denied.

[12] The Board's brief also ignores the actual holding of the Supreme Court in *Hawkins County*: "[T]he Board test is not whether the entity is administered by 'State-appointed or elected officials.' Rather, alternative (2) of the test is whether the entity is "administered *by individuals who are responsible to public officials* or to the general electorate" (emphasis in original). 402 U.S. at 605. The PIAA Board is unquestionably responsible to public officials, *i.e*., the Oversight Committee established by Act 91.

October 3, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to FRAP 27(d)(2) the Petitioner certifies that this motion contains 6,334 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/Maurice Baskin
Maurice Baskin

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Final Reply Brief was electronically transmitted to the Court this 3rd day of October, 2018, using the Court's ECF filing system, and was served on all counsel via electronic notice pursuant thereto.

/s/Maurice Baskin
Maurice Baskin